SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 680

REBECCA SIMON WOLFSOHN, Executrix for the Estate of Joel David Wolfsohn, Deceased, *Petitioner*

v.

GREGORY HANKIN, *pro se*, and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing the appeal on the ground of lack of jurisdiction.

OPINIONS OF THE COURT

The opinion of the Court of Appeals, No. 17,449, is reported at 321 F. 2d 393 (1963) and set forth in the Appendix at p. 1a.

The District Court judgment is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1963. (A. 58, 76). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Petition for rehearing denied September 18, 1963.

QUESTION PRESENTED

Does Rule 60(b)(6) of the Federal Rules of Civil Procedure compel reversal of the ruling of the Court of Appeals which dismisses the appeal for lack of jurisdiction, relying upon Rule 6(b), 59(b), 60(b) and 73(a)?

RULES AND REGULATIONS INVOLVED

Rule 6(b) of the Federal Rules of Civil Procedure reads as follows:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion
>
> (1) with or without motion or notice order the period enlarged if *request* therefor is made before the expiration of the period originally prescribed or as extended by a previous order or
>
> (2) upon motion *made after the expiration of the specified period* permit the act to be done where the failure to act was the result of excusable neglect; but it may not *extend the time* for taking any action under Rules 25, 50(b), 52(b), 59(b), (d) *and* (e), 60(b), *and* 73(a) *and* (g), *except to the extent and under the conditions stated in them.*

Rule 59(b) reads, "A motion for a new trial shall be served not later than 10 days after the entry of the judgment".

Rule 60(b)(2)(6) reads in part, "On Motion *and* upon such terms as are just, *the court* may relieve a party or his legal representative from a *final* judgment, order, or proceeding *for the following* reasons; . . . (2) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);* . . . (6) *any other reason justifying relief from the operation of the judgment* . . ."

Rule 73(a), provides in applicable part as follows:

> "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

Rule 19(1)(b) of the Supreme Court of the United States reads,

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of Appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in con-

flict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision." (Character of reasons for considering petitions).

STATEMENT OF THE CASE

The District Court had jurisdiction in the case by reason of the amount involved and by Section 11-306 of the District of Columbia Code.

Petitoner is the widow of Joel D. Wolfsohn and executrix of his estate. Mr. Wolfsohn was a distinguished member of the bar of the District of Columbia, having entered the practice after culmination of outstanding services as Assistant Secretary of the Interior in the Truman Administration. Petitioner's complaint alleged, *inter alia*, that the respondents had wrongfully terminated her husband's contract of employment and asked for appropriate relief. The case was heard on cross motions for summary judgment.

A vital issue of jurisprudence is here involved but the facts are very simple as follows:

1. On May 7, 1962 the District Court entered an order for summary judgment in favor of respondents. (R. 2)

2. On said date, petitioner's attorney was in the hospital recovering from an illness involving major surgery.

3. On May 11, 1962 petitioner filed a motion to extend the time either to move to vacate or ask for rehearing of the order of May 7, 1962. This motion was dictated by petitioner's counsel from his hospital bed. Counsel for the third-party defendants con-

sented to an order extending such time by writing "no objection" and respondents' counsel acknowledged in writing his receipt thereof. (R. 2)

4. An order granting a 30-day extension of time in which to "either move to vacate or ask for rehearing" was entered on May 11, 1962. (R. 2)

5. At no time did respondents object to the entry of said order extending said time.

6. On June 11, 1962 petitioner filed her motion to vacate and for a rehearing, coupled with an allegation of newly discovered evidence. No hearing was granted on this motion, despite petitioner's request for one. (R. 2)

7. On October 12, 1962 the District Court denied petitioner's motion of June 11, 1962. (R. 3)

8. On November 3, 1962 petitioner filed her notice of appeal from the order of October 12, 1962. (R. 3)

9. Respondent Hankin in his brief to the Court of Appeals, filed on May 3, 1963, stated that

> ". . . the order appealed from, rendered on October 12, 1962, is an order denying a motion for reconsideration. The order which was sought to be reconsidered was rendered on May 7, 1962. The time for taking an appeal from that order expired on November 12, 1962."

10. On May 29, 1963, the Court of Appeals dismissed the appeal on the ground that the notice of appeal was untimely filed. (A. 58, 76).

11. A motion for rehearing of that dismissal was denied by the Court of Appeals on September 18, 1963. (R. 74, 75)

12. Petitioner seeks a review by this Court of the dismissal by the Court of Appeals.

REASONS FOR GRANTING CERTIORARI

This case involves an important interpretation of the Federal Rules of Civil Procedure. It affects the orderly administration of justice by the courts insofar as the petitioner's rights are concerned. It involves this Court's obligations under its own rules to exercise its power of supervision over lower courts which have departed from an accepted and usual course of judicial procedure. (Rule 19(1)(b) Supreme Court Rules).

Petitioner seeks a review of the decision of the Court of Appeals dismissing her appeal on May 29, 1963, and order denying rehearing entered September 18, 1963. The order granting summary judgment, from which petitioner appealed, was entered on May 7, 1962. Four days later, on May 11, 1962, petitioner moved the court for an extension of time in which to move to vacate or ask for rehearing . . . This motion was dictated by petitioner's counsel from his hospital bed and on May 11, 1962 the District Court entered an order granting an extension of 30 days and the motion was filed in that time. No objection was raised and in fact respondent Hankin understood and so stated in his appeal brief that the time for taking an appeal expired on November 12, 1962.

In its decision the Court of Appeals misconstrued the provisions of Rule 6(b) of the Federal Rules of Civil Procedure in stating that the period of time within which a motion for a new trial under Rule 59(b) of the Federal Rules of Civil Procedure (which includes a motion for rehearing) may not be enlarged by the court.

The record shows that petitioner moved under rule 6(b)(1), that is, prior to the expiration of the 10-

day period to extend the time to file a motion for rehearing for extraordinarily good cause, to wit, the confinement of petitioner's counsel in a hospital bed, recuperating from surgery. Obviously the Court of Appeals erroneously relied on 6(b)(2) when it stated that the period of time (for moving for a new trial) might not be enlarged. Section 2 of Rule 6(b) refers to motions made *after* the specified period in which the act to be done is permitted. The Court's reliance on *Slater* v. *Peyser* (91 U.S. App. D.C. 314, 200 F. 2d 360 (1952)) is misplaced since in that case the appellants did not act within the ten days allowed.

Even if this court were to hold that the time may not be enlarged under Rule 6(b) F.R. Civ. P., the Court of Appeals erred in failing to consider the applicability of Rule 60(b)(6) F.R. Civ. P. which authorizes relief from a final judgment, order or proceeding for "any other reason justifying relief from the operation of the judgment". While petitioner agrees that the motion under Rule 60(b) is addressed to the sound discretion of the court she alleges that this discretion was abused by the Court of Appeals. This abuse of discretion occurred despite the action of the trial court in granting the extension of time to petitioner and after a panel of the Court of Appeals had considered the same point and had denied a motion to dismiss the appeal in a *per curiam* order entered January 25, 1963.

Petitioner asserts that the action of the Court of Appeals denies her due process of law and adversely affects her rights. The action of the Court of Appeals was objectionable on the basis of the rules themselves and on the basis of the record before the court.

The action of the Court of Appeals compels this Court to exercise its power of supervision under its Rule 19(1)(b). There has been a serious departure from the accepted and usual course of procedure in this case. The petitioner has been lulled into a false sense of security by an order of a District Court judge which falls squarely within the confines of the applicable rules. It prevents a District Court judge from controlling the progress of litigation where exceptional circumstances, such as illness of counsel in this case, demand. The dismissal of this case on the ground of lack of jurisdiction makes it impossible for lawyers as officers of the court to rely with assurance upon a simple procedural order of a District Court judge.

The administration of justice will be severely handicapped if this atmosphere of uncertainty is permitted to continue. No lawyer in the District of Columbia will be able to safely rely on the enlightened purposes of the Federal Rules of Civil Procedure if the District Court is deprived of the authority to grant relief in these and similar circumstances.

The notice of appeal in this case was filed November 3, 1962 which is less than the 30-day period prescribed by Rule 73(a) of the Federal Rules which time was properly computed from October 12, 1962, to wit the time when petitioner's motion for rehearing was denied. Petitioner cannot be held responsible for the long delay from May 7 to October 12, which was the time that her motion for rehearing was being considered by the trial court. This Court held in *Foman* v. *Davis* (371 U.S. 178 pp. 181, 182), which was also cited in the opinion of the Court of Appeals, that the Federal Rules of Civil Procedure reject the approach that pleading is a mere matter of technicality nd a

game of skill in which one misstep can be detrimental or fatal to a party; that the rules are based rather on the principle that the purpose of pleading is to facilitate the proper decision on the merits.

The Dismissal is in Conflict With a Recent Decision of This Court

In *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, (371 U.S. 215) cited by the Court of Appeals, a Federal District Court rendered a judgment against a party and denied a motion for a new trial while its general counsel was away and could not be reached. Within the time allowed for taking an appeal the party's local counsel applied to the District Court for an extension of time within which to appeal. The District Court granted an extension of two weeks and the notice of appeal was filed within that time. The Court of Appeals, however, dismissed the appeal on the ground that no showing of excusable neglect had been made to the District Court, that there was no basis for waiving the 30-day rule and that, therefore, the appeal was untimely filed.

This Court reversed the lower court and held that "since petitioner had relied on the District Court's ruling extending the time within which to appeal and petitioner would suffer a hardship if it were set aside, the Court of Appeals should have let it stand."

This petitioner's counsel was in the hospital when the judgment herein (which petitioner seeks to have reviewed) was entered. On the fourth day after the entry of the judgment petitioner asked the court to extend the time within which to move to vacate or ask for rehearing and a 30-day extension was granted by the District Court.

Petitioner relied on the District Court's ruling and acted within the time allowed by the court. The Court of Appeals has dismissed the appeal on the ground that the notice of appeal was not timely filed. Petitioner has suffered a hardship solely by reason of the fact that her counsel was in the hospital recovering from an illness involving surgery and from the fact that the District Court granted an extension of time by reason thereof.

This constitutes a special and important reason why certiorari should be granted.

CONCLUSION

The dismissal of petitioner's appeal is without support. Every case which the lower court relied on is in petitioner's favor. It is seriously detrimental to the effective operation of a judicial system in the District of Columbia and will cause chaos by destroying confidence in the reliability and authority of Federal District judges.

Petitioner avers that the Court's statement, "after studying the record as made, including the alleged newly discovered evidence, we find no abuse", is a gratuitous statement not essential to the appeal and should be disregarded by this Court. Petitioner is entitled to her day in court based upon the issues unprejudiced by the assertion that she has no jurisdiction to be there.

For the foregoing reasons, petitioner urges that certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,449

REBECCA SIMON WOLFSOHN, Executrix of the Estate of Joel David Wolfsohn, deceased, *Appellant*

v.

GREGORY HANKIN and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Appellees*

Appeal from the United States District Court for the District of Columbia

Decided May 29, 1963

Mr. Fred I. Simon for appellant.

Mr. John V. Long for appellee Hankin.

No brief was filed and no appearance was entered for appellee Professional Investment Management Company.

Before EDGERTON, *Senior Circuit Judge*, and WRIGHT and MCGOWAN, *Circuit Judges*.

PER CURIAM: "The notice of appeal being untimely filed, this court lacks jurisdiction[1] and the appeal must be dismissed.

An order granting summary judgment against appellant was entered May 7, 1962. On May 11th, on motion of appellant, the District Court signed an order purportedly extending appellant's time to move for a rehearing under Rule 59, F.R.Civ.P. On June 11th a motion to vacate and for rehearing was filed, alleging, *inter alia*, newly discovered evidence. On October 12th appellant's motion for re-

[1] *Slater* v. *Peyser*, 91 U.S. App. D.C. 314, 200 F. 2d 360 (1952); *Randolph* v. *Randolph*, 91 U.S. App. D.C. 170, 198 F. 2d 956 (1952).

hearing was denied. On November 3rd appellant filed notice of appeal. Rule 73(a), F.R.Civ.P.

Under Rule 59(b), F.R.Civ.P., a "motion for a new trial," which term includes a motion for rehearing, must be served "not later than 10 days after the entry of the judgment." This period of time may not be enlarged by the court. Rule 6(b), F.R.Civ.P. Since the appellant's motion for rehearing was not filed until June 11th, 35 days after summary judgment, it came too late to be considered or to interrupt the running of the time for appeal.[2] *Slater* v. *Peyser, supra*, Note 1. Since appellant did not file her notice of appeal until November 3rd, it came too late to be considered as an appeal from the judgment of May 7th.[3] See Rule 73(a), F.R.CivP.

Treating appellant's motion of June 11th as one for relief from a final judgment under Rule 60(b), F.R.Civ.P., appeal from the October 12th denial of which would be timely, we still affirm the disposition of the District Court. The motion under Rule 60(b) addresses itself to the sound discretion[4] of that court, and, after studying the record as made, including the alleged newly discovered evidence, we find no abuse.

So ordered.

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[2] Compare *Harris Lines* v. *Cherry Meat Packers*, 371 U.S. 215 (1962).

[3] Appellant's Notice of Appeal stated that she was appealing from the order of October 12th. Compare *Foman* v. *Davis*, 371 U.S. 178, 180-182 (1962).

[4] *System Federation* v. *Wright*, 364 U.S. 642, 645-648 (1961); *McLeod* v. *D.C. Transit System, Inc.*, 108 U.S. App. D.C. 399, 283 F. 2d 194 (1960).